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Master and Servant -- Liability for Injury to Invitee of Truck Driver

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seems to indicate a more liberal view toward validating life insurance policies.[13] A possible relaxation of the "partnership view" may perhaps be found in the construction of incontestable clauses.[14]

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Master and Servant—Liability for Injury to Invitee of Truck Driver

Is a truck owner liable for injuries to a boy who, invited to ride on the running board by the driver without authority, was injured when he was thrown off as the truck rounded a corner at a rapid rate? The court held that the driver exceeded the scope of his employment in inviting the boy to ride.[1] A similar result was reached in another case when the secretary-treasurer of a company invited plaintiff's intestate to ride in a company car which was wrecked at a street intersection.[2] No evidence was introduced to show that the secretary was given to the habit of carrying passengers without authorization. Had this been established, defendant company might have been charged with constructive notice of violation of its rule and hence, with its abrogation.[3]

It is generally conceded that a servant has no implied authority

[13] In Hardy v. Aetna Life Ins. Co., 152 N. C. 286, 67 S. E. 767 (1910), after a thorough review of Trinity College v. Ins. Co., *supra* note 12, Powell v. Dewey, *supra* note 10, Burbage v. Windley's Ex'rs., 108 N. C. 351, 128 S. E. 839, 12 L. R. A. 409 (1891), Hinton v. Mutual Reserve Fund Life Ass'n., 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161 (1904), it was decided that, although prior North Carolina cases seemed to refuse to allow the good faith assignment of life insurance to persons having no insurable interest, an assignment would be valid where it was not a cloak to a wagering contract or transaction. In American Trust Co. v. Life Ins. Co. of Va. *supra* note 7, the validity of N. C. Cons. Stat. Ann. (1919) §1126 (5) [passed as a result of Victor v. Louise Mills, 148 N. C. 107, 61 S. E. 648 (1908)] giving every corporation an insurable interest in the life of any officer or agent whose death would cause financial loss to the corporation, was recognized.

[14] In American Trust Co. Life Ins. Co. of Va., 173 N. C. 558, 560, 92 S. E. 706, 709 (1917), there is the following dictum: "There is authority for the position that the incontestable clause in a policy of insurance covers every defense except that there was no insurable interest at the time of issuing the policy (5 Elliott on Contracts, §4077), although the trend of modern authority is that the clause, when it takes effect within a reasonable time after the issue of the policy and not from the date, cuts off all defenses except those specially allowed by the clause itself."

[1] Cotton v. Carolina Truck Co., 197 N. C. 709, 150 S. E. 505 (1929).

[2] Collar v. Grocery Co., 150 S. E. 2 (W. Va. 1929).

[3] Hammond v. Coal Co., 105 W. Va. 423, 143 S. E. 91 (1928).

to invite or permit a third person to ride on the master's vehicle.[4] And when the driver has so exceeded his authority or violated his express instructions, the invitee of the driver is in no better case as regards the master than a trespasser.[5] The master owes no duty to the trespasser except to refrain from wilfully or wantonly injuring him.[6] On the other hand, it has been held that the trespasser is not deprived of all recourse against the master even in case of a negligent injury.[7] The owner of a motor truck or car is not bound to keep a lookout for trespassers, nor to maintain his car in a reasonably safe condition for them. But independent of the authority granted to the driver, the duty to avoid injuring one whose presence and peril are known is so imperative that it must apply even to trespassers. Thus the driver, by his knowledge of the situation of the person he has invited, places the master in the position of owing to the known trespasser ordinary care.[8] Although the master is not required to exercise the same degree of care as where permission is authorized ostensibly,[9] he is liable for a reckless injury by the servant who is otherwise engaged about his master's business.[10] A reckless injury may mean "careless, inattentive, negligent, or desperately heedless."[11] In *Higbee Co. v. Jackson*,[12] the court even went so far as to say, "this auto truck was placed in the hands of the driver, making him conclusively the company's agent, not only in the use, but also in the abuse, of the right to public safety on the part of the travelling public, either on or off the truck."

[4] Dover v. Mayes Mfg. Co., 157 N. C. 324, 72 S. E. 1067 (1911); Christie v. Mitchell, 93 W. Va. 200, 116 S. E. 715 (1923).

[5] Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804 (1920); Hughes v. Murdoch Co., 269 Pa. 222, 112 Atl. 111 (1920).

[6] Nelson v. Traction Co., 276 Pa. 178, 119 Atl. 918 (1923).

[7] Fry v. Southern Pub. Util. Co., 183 N. C. 281, 111 S. E. 354 (1922) (Driver knew of perilous position of boy and recklessly exposed him to danger).

[8] Kalmich v. White, 95 Conn. 568, 111 Atl. 845 (1920); Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238 (1903).

[9] Purple v. U. P. Ry. Co., 114 Fed. 123 (C. C. A. 8th, 1902).

[10] Smith Bros. v. Williams, 294 S. W. 309 (Texarkana Civ. App. 1927). But suppose driver deviates from employment? *Depends on degree of deviation.* Healey v. Cockrill, 133 Ark. 327, 202 S. W. 229 (1918); Drakenburg v. Knight, 178 Wis. 386, 190 N. W. 119 (1922); Cummings v. Truck Co., 241 Mass. 292, 135 N. E. 134 (1922).

[11] Short v. Kaltman, 192 N. C. 154, 134 S. E. 425 (1926); Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275 (1913).

[12] 101 Ohio St. 75, 128 N. E. 61 (1920). *Accord:* La Rose v. Shaughnessy Ice Co., 197 App. Div. 821, 189 N. Y. Supp. 562 (1921); Murphy v. Ross, 2 Ir. R. 199 (1920); Grabau v. Pudwill, 45 N. D. 423, 178 N. W. 124 (1920). *Contra:* Goldberg v. Borden's Co., 227 N. Y. 465, 125 N. E. 807 (1920); Schulwitz v. Delta Lumber Co., 126 Mich. 559, 85 N. W. 1075 (1901).

Such an unauthorized invitee has been considered as a fellow servant of the driver and recovery barred, where the invitee gratuitously assisted in unloading the truck.[13] But upon very similar facts the same court one year later decided that the relation had been terminated and permitted a recovery.[14]

Most of these cases which granted a recovery were concerned with infant plaintiffs whose ignorance of danger and actual peril are facts known to the driver, whose knowledge may be imputed to the master.[15] Indeed, these representatives of the minority view[16] have been criticised as questionably combining the doctrine of "dangerous machinery"[17] with that of "attractive nuisance," where neither existed.[18]

Recently there has been a tendency on the part of the legislatures to break away from the rigid limitation of the rules of liability of the owner of an automobile. Thus, in some states, this tendency has been embodied in statutes providing that every owner of an automobile operated upon the public highway shall be liable for injuries resulting from negligence in operation of such motor vehicle in the business of the owner or otherwise, by any person legally using or operating it with the permission, express or implied, of the owner.[19] Two states have modified this liability to the effect that the owner is not necessarily liable for damages beyond the value of the car, when any other person is operating it, although such damages constitute a lien upon the car.[20]

In the instant case it is suggested that in the light of the decisions and in consideration of the age of the plaintiff (eleven years) that the court might have been justified in arriving at a different conclusion.

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[13] Gunderson v. Eastern Brewing Co., 71 Misc. 519, 130 N. Y. Supp. 785 (1911).

[14] Nudelman v. Borden's Co., 77 Misc. 103, 136 N. Y. Supp. 49 (1912).

[15] Morris v. Peyton, 149 Va. 318, 139 S. E. 500 (1927).

[16] Note (1920) 14 A. L. R. 145.

[17] Horack, *The Dangerous Instrument Doctrine* (1917) 26 YALE L. J. 224.

[18] (1928) 6 N. C. L. REV. 338.

[19] Mich. Pub. Acts (1909) No. 318. (Amended so owner not liable when car driven without his knowledge or consent. Mich. Comp. Laws [Cahill, 1915] §4825.) Acts 38th Gen. Assem. of Iowa, ch. 275, §12. Conn. Gen. Stat. (1918) §1572, (bailor liable for injury resulting from negligence of bailee). Repealed—Conn. Pub. Acts (1921) ch. 334. Cal. Gen. Laws (1919) p. 223, §14 (person signing for minor's license to drive is liable for minor's negligence). Laws of N. Y. (1928) ch. 508, p. 1092. (Amended to exclude lessors of automobiles who carry public liability insurance.)

[20] S. C. Gen. Laws (1915) (27 St. at Large, p. 737) §1. Tenn. Gen. Laws (1905) ch. 173, §5.